IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN, JAIPUR BENCH, JAIPUR

S. B. CRIMINAL MISC. PETITION NO. 369 / 2000

Smt. Kusumlata & Anr.

VERSUS

State of Rajasthan & Anr.

Date of Judgment: 13th April, 2007

Hon'ble Mr. Justice R. S. Chauhan

Mr. V.R. Bajwa, for the Petitioners.
Mr. S.N. Gupta, Public Prosecutor for the State.
Mr. N.A. Naqvi, for the Complainant.

REPORTABLE

(Per Court):

The petitioners have challenged the order dated 10.5.2000 passed by the Additional Sessions Judge No.1, Alwar, whereby the learned Judge has framed charges against petitioner No.1, Smt. Kusumlata, for offences under Sections 302/34, 328/34, 324/34 and 342 IPC and in the alternative, for offence under Section 306 IPC. The learned Judge has also framed charges against petitioner No.2 Kumari Sanju for offences under Sections 302, 328, 324/34, 342 IPC and in the

alternative, under Section 306 IPC.

In brief the facts of the case are that on 16.10.1996, the complainant, Deen Dayal, submitted a written report at Police Station Shivaji Park, Alwar, wherein he alleged that on that day, around 10 O'clock in the morning his son Sanjay had gone to his uncle's house situated at Nehru Nagar at Alwar. Dispute had been going between Sanjay and one Ranveer Choudhary of Nehru Nagar over the love affair that had developed between Sanjay and Ranveer Choudhary's daughter Kumari Sanju. While Sanjay was at his uncle's place, Ranveer's son came to the house of Sanjay's uncle and told Sanjay that he is being called at the house of Ranveer Choudhary. Sanjay went to the house of Ranveer Choudhary. But, soon thereafter shrieks of Sanjay were heard from inside the house of Ranveer Choudhary. The neighbors had collected outside the house when they heard the shrieks. Little later, Sanjay was thrown out of Ranveer Choudhary's house. The neighbors noticed that froth was coming out of Sanjay's mouth and his hands were bleeding. He was also shouting that family members of

Ranveer Choudhary had poisoned him. Therefore, the people immediately rushed him to the Government Hospital at Alwar. On the basis of this report, a formal FIR, FIR No.180/96 was registered for offences under Sections 323, 342 and 328 IPC. Immediately, the Police went to the Government Hospital and recorded Sanjay's statement under Section 161 Code of Criminal Procedure ('Cr. P. C', for short). Unfortunately, at 10.30 P.M. Sanjay expired. With his death the Police also added offence under Section 302 IPC. Not only the Medical Jurist conducted the post-mortem, but he also sent Sanjay's Viscera for chemical examination. According to the Forensic Science Laboratory ('FSL', for short) Report dated 28.4.1997, Viscera did not show presence of any poison. Since the Medical Jurist had reserved his opinion about the Sanjay's cause of death, he again asked the FSL to re-examine the viscera. But, even according to the second report dated 25.7.1997, the result was in the negative. After receiving both the reports, according to the Medical Jurist, the cause of death was shock due to cardio-respiratory arrest. After the investigation was completed, the Police filed the charge sheet

against both the petitioners. After hearing the Public Prosecutor and the counsel for the accused, vide order dated 10.5.2000, the learned Judge framed the charges as aforementioned. Hence, this petition before this court.

Mr. V.R. Bajwa, the learned counsel for the petitioners, has vehemently argued that according to the dying declaration given by Sanjay before the Police, the deceased has clearly stated that Smt. Kusum Lata, Kumari Sanju's mother, had clearly refused the marriage between Sanjay and Kumari Sanju. Thereupon, Kumari Sanju had brought a bottle containing some capsules. She had suggested that since her parents are not agreeable to their marriage, it is better that they kill themselves. She placed three tablets in his hand, which he took. Later on, Smt. Kusum Lata came into the room carrying a knife. There was scuffle between Sanjay and Sanju's mother. Because of the scuffle, his hands were cut. The dying declaration, therefore, does not reveal that the petitioners have committed an offence under Section 302 IPC. Firstly, the deceased does not allege that the petitioner No.1 tried to cause

his death. On the other hand, the only allegation leveled against petitioner No.2 Kum. Sanju is that she abated the deceased to commit suicide and that she placed three poison tablets in his hand. Therefore, the ingredients of offence under Section 302 IPC are conspicuously missing.

Secondly, in a case of death by poisoning, the prosecution has to prove three ingredients: a) the petitioner's procured the poison, b) they administered the poison and c) the death was caused due to poison. The investigating agency has not brought any evidence regarding procuring of the poison. Although the deceased claimed that he was poisoned, but both the FSL Reports are negative with regard to the presence of poison in the Viscera. Therefore, the reports disprove the case of the prosecution that the petitioners poisoned the deceased. Hence, the prosecution has failed to show any evidence with regard to the first and third element required in such a case.

Thirdly, according to the post-mortem report, the cause of death is shock due to the cardio-respiratory arrest. The

prosecution has not gathered any evidence to show that poisoning caused the cardio-respiratory arrest. Therefore, there is no linking evidence to prove the connection between the petitioners and Sanjay's death. Therefore, even on a prima facie basis, the death cannot be said to be homicidal in nature; it appears to be a natural death although in unfortunate circumstances.

Fourthly, Smt. Kusum Lata had sustained sharp edged injuries by knife. Therefore, the possibility that the deceased was aggressor cannot be ruled out. Lastly, that the learned Judge has incorrectly relied on the case of Mahaveer Bandal Vs. State of Bihar (AIR 1972 SC 1331) in order to conclude that even if no poison is detected in the Viscera, still death by poisoning is a strong possibility. According to the learned counsel, since 1972 Forensic Science has made immense progress. Today, the slightest trace of poison can be detected by sophisticated means. Therefore, the learned Judge has wrongly relied on the said precedent. According to the learned counsel, the case does not travel beyond offence under Section

306 IPC. Despite the absence of ingredients of offence under Section 302 IPC, the learned Judge has framed charges for offence under Section 302 IPC. In order to support his contentions, the learned counsel has relied upon the cases of Smt. Phino v State of Punjab (1975) 4 SCC 119, State of A.P. v Gangul Satya Murthy ((1997) 1 SCC 272), Ramgopal v State of Maharashtra (AIR 1972 SC 656).

On the other hand, Mr. N.A. Naqvi, the learned counsel for the complainant, has strenuously argued that the jurisdiction under Section 482 Cr.P.C. is extremely narrow. The court would not be justified in nipping the trial in the bud. Since the prosecution has made a strong case against the petitioners, the trial should be permitted to complete its course. In order to buttress his case, the learned counsel has relied upon the case of State of Delhi v Gyan Devi & Ors. (AIR 2001 SC 40).Secondly, Sanjay had gone to the house of the petitioners where both the petitioners administered poisonous capsules to him. When he came out of the house, his mouth was full of froth and he told the people that he had been poisoned. Moreover,

eventually he died. Therefore, the ingredients of Section 302 IPC are abundantly present. Thirdly, the learned Judge has framed the charges alternatively on the one hand 302, 302/34 IPC and on the other hand 306 IPC. Hence, the trial court should be left free to appreciate the evidence produced during the trial and to decide the guilt or innocence of the petitioners.

The learned Public Prosecutor Mr. S.N. Gupta has echoed Mr. Naqvi's arguments.

We have heard the learned counsel for the parties and have perused the record available before this court.

This case raises two legal issues: firstly, the scope and ambit of power to frame charges under Section 228 Cr. P. C. Secondly, the scope of inherent jurisdiction of this court to interfere with Charge orders.

Sections 227 and 228 of the Code deal with discharge and framing of charge respectively. Section 227 reads as

under:

> Discharge- If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record the reasons for so doing.

On the other hand, Section 228 of the Code reads as under:

> Framing of charge-(1) If, after such consideration nd hearing as aforesaid, the Judge is of the opinion that there is ground for presuming that the accused has committed an offence which-
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> (a) is not exclusively triable by the Court of Sessions, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial magistrate, or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, or such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trail of warrant-cases instituted on a police report;
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> (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.
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> (2) Where the Judge frames a charge under clause (b) of sub-section (1), the charge shall be read and

> explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.

A bare perusal of these provisions clearly reveals that in the case of discharging the accused or in the case of framing of the charge, the Judge is required to take certain concrete steps. Firstly, to consider the record of the case and the documents submitted therewith. Secondly, the trial court shall hear both the Prosecution and the accused. Thirdly, after hearing both the parties, in case the trial court considers that there is not sufficient ground for proceeding against the accused, then it shall discharge him. Fourthly, in case the accused is to be discharged, the Judge must record reasons for such discharging.

But, in case after such consideration and hearing, the Judge is of the opinion that there is ground for presuming that the accused has committed an offence, then he should follow the procedure laid down in Section 228 of the Code. Thus, the Judge must consider if there is sufficient evidence to formulate an opinion that the offence has been committed by the

accused. Consideration of the facts has to be a substantial consideration and not an illusionary one. To consider means to examine with judicious mind. The phrase “of the opinion” has been interpreted to mean to come to a conclusion after weighing the evidence. Of course, at the moment of framing of charge, the Judge should not undertake a meticulous examination of the evidence. But nonetheless, he must sift the evidence to see if there is “sufficient” evidence to constitute the ingredients of the offence and to connect the accused to the offence. “Sufficient” has been interpreted to mean the existence of “grave suspicion” and not merely likelihood or mere “suspicion”. Since charge is framed after hearing both the parties and after examining the evidence produced by the Investigating Agency more than mere `suspicion’ should exist in order to warrant the framing of the charge. A “grave suspicion” should connect the accused to the alleged crime.

While dealing with the scope and ambit of Sections 227 of the Code, in the case of Union of India v Prafulla Kumar Samal & Ano.,((1979) 3 SCC 4) the Hon’ble Supreme Court laid down

certain principles in the following words:

> That the Judge while considering the question of framing of charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.
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> 1) Where the materials placed before the Court discloses grave suspicion against the accused, which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.
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> 2) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however, if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.
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> 3) That in exercising his jurisdiction under Section 227 of the Code of Judge which under the present Code is a senior and experienced court cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however, does not mean that the judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conduction the trial.

The Hon’ble Supreme Court has expressed similar view

in the case of Dilawar Balu Kurane v State of Maharastra (2002 WLC (SC) Criminal 182). Therefore, while examining the legality of the Order framing the charge, we must consider if the learned Judge has applied these principles or not.

As far as the scope of Section 482 Cr.P. C. is concerned in interfering with Charge orders, in the case of State of Orissa & Ano v Saroj Kumar Sahoo (2005) 13 SCC 540, the Hon'ble Supreme Court has held as under:

> " The exercise of power under Section 482 CrPC is the exception and not the rule. The section does not confer any new powers on the high Court. It only saves the inherent power which the Court possessed before the enactment of CrPC. The inherent powers have been conferred, apart from express provisions of law, which are necessary for proper discharge of functions and duties imposed upon it by law. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under CrPC, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise.
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> While exercising the powers under the Section 482 CrPC, the High Court does not function as a court of appeal or revision. Inherent jurisdiction under the section, though wide, has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the

tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone the courts exist. In exercise of the powers the court would be justified in quashing any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice.

However, the inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. But no hard-and-fast rule as regards cases in which such power can be exercised can be laid down.

Some categories of cases in which inherent power can and should be exercised to quash the proceedings are :

(i) Where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;

(ii) Where the allegations in the first information report or complaint taken at their fact value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

However, in dealing with the last category, it is important to bear in mind the distinction between a case where there is no legal evidence or where

there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 CrPC, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or , needless harassment. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death. The inherent power should be exercised sparingly and that too in the rarest of rare cases.

In the instant case the investigation was not complete and at that stage it was impermissible for the High Court to look into materials, the acceptability of which is essentially a matter for trial. While exercising jurisdiction under Section 482 CrPC, it is not permissible for the Court to act as if it was a trial court. Even when charge is framed at that stage, the Court has to only prima facie be satisfied about the existence of sufficient ground for proceeding against the accused. For that limited purpose, the Court can evaluate material and documents on records but it cannot appreciate the evidence."

Thus, while exercising the power under Section 482 Cr. P. C. this court cannot go into meticulous examination of the evidence. At best, it must shift the evidence to see if sufficient reasons exist / strong suspicion exists for the trial court to

frame the charges.

In the present case, Sanjay's dying declaration tells us about what occurred at the petitioner's house. It also points towards the probable cause of his death, although the true cause of his death is a matter of evidence to be produced by the prosecution during the course of the trial. Even if sophisticated forensic means do exist to discover the slightest trace of poison, even if the two FSL Reports are in the negative for the presence of poison, it is too early to jump to the conclusion that the death was not caused by poisoning. Whether the death was homicidal, or suicidal, or natural in nature is a matter to be adjudged by the trial court after appreciating the evidence produced during the trial. This court, under its inherent power, cannot convert itself into a trial court and cannot meticulously examine the evidence to pronounce the guilt or innocence of the petitioners.

As far as Mr. Bajawa's first contention is concerned, prima facie it is true that the deceased has not alleged that

Smt. Kusum Lata had committed any overt act to cause his death. However, she has not been charged with offence under Section 302 IPC simpliciter. She has been rightly charged with offence under Section 302 read with Section 34 IPC. According to Sanjay, Smt. Kusum Lata was present in the house and in the room. In fact, allegedly she had come into the room carrying a knife. Allegedly, a scuffle had taken place between her and the deceased. Allegedly, both she and the deceased have sustained sharp edged injuries. Therefore, prima facie she seems to have shared the common intention with the petitioner No. 2 for killing the deceased. Hence, the learned trial court has validly charged her for offence under Sections 302 read with 34 IPC.

With regard to the charge against Kumari Sanju for offence under Section 302 IPC simpliciter, Sanju's dying declaration exists to show that allegedly the poison tablets were given to him by Kumari Sanju. In case Sanjay and she wished to commit suicide, as the parents were not permitting them to marry, she too would have consumed the tablets. But,

according to the prosecution, she did not. Therefore, prima facie case does exist for framing the charge of offence under Section 302 IPC against her.

Mr. Bajawa's second contention with regard to the duty of the prosecution in case of poisoning cannot be accepted. Under the inherent power of the court, this court cannot meticulously appreciate the prosecution evidence so as to weigh its strength or weaknesses. Therefore, whether the prosecution fails to prove the procurement of the poison, or the presence of the poison, or its possible effect on the cardio-respiratory system is again a matter of evidence. The prosecution must be given "play at the joints" to prove its case by cogent evidence. The prosecution cannot be nipped in the bud early in the trial.

Mr. Bajawa's another contention with regard to Sanjay being the aggressor is also subject to the evidence produced during the trial. Since the trial is yet to unfold itself, again it would be too premature for this court to pronounce its decision

on the said issue. The contention raises the defense of right of private defense. But surely it is for the trial court to adjudge the existence of the said defense.

The learned counsel for the petitioners has relied on few precedents in order to buttress his case. However, these precedents are not applicable to the present case. The case of Smt. Phino (supra) and the case of Gangula Satya Murthy (supra) deal with cases after the courts recorded convictions. Thus, the cases were adjudged after the trial court had appreciated the entire prosecution evidence. But, in the present case, the evidence is yet to be produced. Therefore, these two cases do not come to the rescue of the petitioners.

In conclusion, although this court has vast power under Section 482 Cr. P. C. to interfere with the Charge order, but the present case is not one of those cases, where the said power should be exercised.

In the result, this petition has no force. It is, hereby,

dismissed. The record of the trial court shall be returned immediately.

R. S. Chauhan, J.